"give foreign entities more certainty when making investment decisions."[27] The Commission adds that a "uniform standard" governing access to the U.S. market "could be administratively more efficient and less of a burden on the Commission's resources than the drafting of multiple sets of conditions to fit the particular attributes of each foreign market on a case-by-case basis."[28]

Teleglobe applauds the Commission for raising these concerns and stressing the desirability of an efficient foreign carrier market entry policy. However, Teleglobe submits that the approach proposed in the Notice does not constitute a "clear" or "uniform" standard for reviewing foreign carrier applications, and is likely to increase rather than diminish the delays foreign carriers currently face when seeking to enter the U.S. market.

As an initial matter, any "uncertainty in the market" resulting from the Commission's current market entry regulation is due first and foremost to the length of time it takes for the Commission to act on international facilities applications involving foreign investment. The process itself is needlessly cumbersome, requiring a Section 214 application for every international route on which a carrier wishes to operate. Regardless of the market entry policy it implements, the single most effective thing the Commission could do to reduce market uncertainty is to accelerate the processing of such applications.

27/ NPRM at para. 25.

28/ NPRM at para. 32.

The Commission also could implement procedural changes in the Section 214 process that would reduce the administrative burdens faced by carriers.[29] Teleglobe stresses, however, that the Notice contains no proposals to streamline the Section 214 process or adopt deadlines or targets for processing such applications.

In fact, the modified market entry policies proposed in the Notice almost certainly would result in far more extensive case-by-case review of Section 214 international facilities applications, longer delays in processing such applications, and thus greater uncertainty in the market. The Commission does not propose a "clear" or "uniform" standard for evaluating applications by foreign carriers with different degrees of market power in their primary markets. On the contrary, the Commission proposes a revised public interest standard involving the review and elaborate balancing of numerous additional factors and sub-factors that can only be undertaken on a case-by-case basis.

The Commission proposes to "maintain flexibility" in applying the revised Section 214 public interest standard. As discussed in section II above, the Commission proposes to consider six "indicators" to determine whether effective market

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[29] For instance, instead of requiring U.S. international carriers to submit a Section 214 application for each route on which they wish to provide international simple resale (ISR) service, the Commission could adopt a rule under which the scope of any existing ISR license would be expanded automatically to include any international route on which the Commission subsequently authorizes ISR. In Canada, ISR providers are neither licensed nor regulated, and Canada's policy automatically allows ISR to any country that also allows it.

access exists in a foreign country. The weight to be given to each indicator in each "particular market" would be determined based on "the arguments of the applicant and commenting parties."[30] After applying the effective market access test, the Commission would proceed to assess all the other factors under its current Section 214 public interest standard. The Commission then would balance the results of the effective market access test and the various other factors and reach a decision on the application.

Whatever the merits of such "flexibility," it is not consistent with a "uniform standard" approach. Teleglobe submits that the proposed effective market access test in the Notice would undermine the Commission's stated objectives of reducing "uncertainty in the market" and establishing a "clear standard for evaluating applications of foreign carriers with different degrees of market power in their home markets."

IV. The Proposed Effective Market Access Standard Could Set Back Progress in Opening Global Telecom Markets to Competition

The Commission states in the Notice that "the promotion of effective competition in the global market is our primary goal."[31] FCC Chairman Reed E. Hundt stressed this point in a recent statement before a congressional subcommittee, stating

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30/ NPRM at para. 40.

31/ NPRM at para. 27.

that the "broad goal" of this proceeding "is to determine the best way to regulate foreign access to the U.S. communications market in order to promote global competition."[32]

Rather than promoting global competition, the proposals in the Notice would likely be interpreted by foreign carriers and governments as a "closing" of the U.S. market. This conclusion follows logically from the fact that the Commission is proposing to add on to the effective market access test all of the existing factors it currently considers under the Section 214 public interest standard. The imposition of additional entry requirements by the U.S. could erode the United States' leadership in promoting open markets and global competition. For instance, the Commission bases its proposals in large part on concerns about the exercise of market power by foreign carriers in their primary markets. Foreign governments might react by delaying the removal of their own restrictions in the name of protecting their national carriers from the largest U.S. carriers' ability to leverage their dominant positions in the international services market.

Given the strategic importance of the telecommunications sector to every nation's economic and industrial well-being, foreign countries have a legitimate role in ensuring the survival of their national carriers. While many countries are transitioning toward a competitive model that

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[32] Statement of Reed E. Hundt, Chairman, FCC, on Section 310 of the Communications Act of 1934, Before the Subcommittee on Commerce, Trade, and Hazardous Materials, U.S. House of Representatives.

allows foreign carrier entry, the pace of these changes depends on numerous economic, political, social, and other considerations. These countries are highly unlikely to adopt any approach that jeopardizes the existence of their national carriers. In particular, they are unlikely to open their facilities-based international services markets, virtually overnight, to foreign entry and U.S.-style regulation, if such a step would risk destroying these national economic assets.

The Commission is aware of the complex issues raised by the introduction of competition in international services, such as the appropriate regulation of international simple resale. Yet the Commission's proposals, if adopted, could result in foreign carriers being denied entry into the U.S. market unless the governments in their primary markets complete the process in the "near future." If foreign governments view such a decision as unreasonable, it could affect their perception of the benefits of liberalization and global competition, and diminish their commitment to opening their markets.

The Commission should also recall that many investments by U.S. carriers in foreign countries likely would not have been allowed had those countries applied the market entry standard the Commission is proposing to adopt. For instance, several U.S. carriers have acquired interests in cellular telephone licensees in Eastern European countries that exceed the foreign ownership levels in U.S. radio licensees under Section 310(b) of the Communications Act.

In sum, adoption of the proposals in the Notice would be likely to slow or even halt the strong global momentum that has built up in favor of liberalization and competition. In February, for instance, at the G7 meeting in Brussels, ministers committed themselves to "promoting dynamic competition" in the telecommunications market.[33] The Commission has, to a large extent, inspired and encouraged this global trend toward liberalization. Given the clear success of these efforts, the imposition of new restrictions by the U.S. on foreign carrier entry is both unnecessary to promote global competition and potentially a threat to continued progress toward that goal.

V. The FCC's Current Public Interest Standard Prevents Anticompetitive Conduct Against U.S. Carriers in Foreign Carriers' Primary Markets

The Commission states that its current public interest standard for evaluating foreign carrier Section 214 international facilities applications "may not adequately address questions of . . . undue discrimination and potential anticompetitive effects."[34] In fact, the current policy focuses specifically on the issue of undue discrimination by foreign carriers against unaffiliated U.S. carriers in the foreign carrier's home market. The Commission has developed and imposed requirements that

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33/ See Telecommunications Reports, "G-7 Meeting Maps Global Paths to Info Society/G11", March 6, 1995 at 19.

34/ NPRM at para. 23.

effectively prevent such discrimination. The Commission does not explain adequately why it now finds these policies inadequate.

The FCC does state that there is a need to "articulate standards to provide more coherent principles" for evaluating applications by foreign carriers with different degrees of market power in their home markets.[35] As an initial matter, however, the FCC's current policy, as articulated in the International Common Carrier proceeding, is coherent.

VI. The FCC's Proposed Reciprocal Approach Could Hinder Rather Than Promote the Opening of Foreign Markets

The Commission repeatedly expresses its concern that "asymmetric market access is detrimental to both U.S. service providers and U.S. consumers." As an initial matter, the Commission fails to provide any evidence, beyond this conclusory statement, that asymmetric market access in fact has or will harm U.S. consumers.

Moreover, the Commission's contention that asymmetrical market access is harmful is undermined by the very example it cites in support of that contention -- the cellular market. The Commission states that "U.S. wireless service providers' participation in foreign countries' cellular markets has strengthened both U.S. and foreign competitors and has resulted in improved service to both foreign and U.S. consumers." The

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[35] NPRM at para. 23.

Commission adds that "(c)losed markets frustrate all these public interest benefits." Yet as the Commission well knows, the cellular market is marked by strong asymmetries: while the markets of the countries cited by the Commission are open, foreign cellular carriers' participation in the U.S. cellular market continues to be severely restricted under Section 310(b) of the Communications Act.

Were the FCC to impose its proposed effective market access standard, other countries could be expected to impose a similar standard on U.S. carriers seeking to enter their markets. Had such standards applied elsewhere, the U.S. cellular carriers cited by the FCC might not have been able to participate in foreign markets.

In order for a foreign carrier to pass the effective market access standard, the carrier's primary markets would have to be found by the FCC to afford, "either currently or in the near future," open entry into its basic international telecommunications facilities-based services market. Yet none of the telecommunications market segments in which competition has been introduced in the U.S. was opened as rapidly as the FCC apparently intends to set as the standard under the effective market access test. Few foreign governments are likely to accept an entry restriction that requires them to mimic the U.S. regulatory model governing international facilities-based services, and to do so immediately, or in the "near future."

In the Notice, the FCC documents the trend towards the provision of "end-to-end" global services. AT&T (the dominant international services provider in the world's largest international market) and other large U.S. carriers benefit from significant economies of scale and scope that virtually guarantee them a dominant role in the new global services environment. In many small economies, statutory and regulatory provisions restrict entry into the facilities-based international services market. Rapid removal of all entry restrictions by these countries could result in the obliteration of their national carriers as they are overwhelmed by AT&T's ability to leverage its global market advantages. Teleglobe submits that it is not reasonable for the FCC to require countries to risk their national carriers' survival as a condition for being allowed to participate in the U.S. market.

VII. The Proposed Effective Market Access Test Appears to Serve U.S. Carriers' Interests, Not U.S. Consumers or the Public Interest

In justifying the proposed imposition of an effective market access abroad standard, the FCC asserts that "many important foreign communications services and facilities markets or market segments remain closed to U.S. competition." As examples, the Commission cites the "monopoly in basic local voice services" in most countries of the Asia-Pacific region. The Commission offers no explanation of how the U.S. public interest would be served by denying U.S. consumers the benefit of competitive entry into the U.S. international facilities market by carriers from the Asia-Pacific region on the ground that these countries' local telephone service markets are monopolistic. The Commission's analysis is particularly questionable given the fact that basic local voice services remain a monopoly in many U.S. states.

This example highlights the danger of the proposed reciprocal market entry approach. In response to the Commission's new entry standard, if adopted, other countries could be expected to adopt similar standards, thus thwarting market opening on a global scale. The Commission's proposed policies appear expressly to favor the largest U.S. international carriers to the detriment of smaller U.S. carriers and foreign entities. For instance, the Commission proposes to exempt "co-marketing" agreements, such as AT&T's WorldPartners alliance, from the effective market access standard, so long as they are "non-exclusive" in terms of interconnection. Yet such arrangements, which AT&T and other large carriers are uniquely positioned to negotiate and enter into (without selling an equity stake), give the participants essentially the same opportunities to offer global "end-to-end" services as equity arrangements that would be subject to the standard. Many of the U.S. carriers' partners in such alliances are monopoly international service providers in markets that are closed to U.S. carrier entry. Yet under the Commission's proposed approach, such arrangements would be exempt from scrutiny.

Moreover, co-marketing agreements raise the same risks of undue discrimination as equity arrangements that would be subject to the effective market access test. A basic feature of co-marketing agreements is exclusive marketing arrangements. Such deals can have as strong a negative impact on new entrants' ability to compete in a market as exclusive interconnection arrangements. The Commission itself acknowledges the importance of marketing concerns by including them in its analysis of the risks of anticompetitive behavior by foreign entrants into the U.S. market. Yet under the Commission's proposals, exclusive marketing arrangements would not trigger application of the effective market access test.

Another example of the unequal application of the FCC's proposals concerns the definition of "facilities-based carrier." The definition classifies a carrier as facilities-based in the U.S. if it purchases an ownership or IRU interest in a submarine cable or if it leases satellite half-circuits from Comsat. Yet the ability of a U.S. carrier to lease satellite capacity from a "carrier's carrier" in another country would not, for the purposes of the proposed effective market access test, be deemed to demonstrate the existence of a competitive international facilities market in that country. This definition could have a particularly inequitable effect on Teleglobe and other Canadian carriers seeking to enter the U.S. international facilities market. Specifically, the Commission apparently may apply a different definition of facilities-based carriage for the purposes of determining whether a foreign country's international facilities market is open to competition.

Similarly, the Commission seeks comment on AT&T's proposal to prohibit refiling of international traffic by foreign carriers. The Notice does not raise or discuss the question of why such a prohibition should apply only to foreign carriers, and not to U.S. international carriers. This omission is difficult to square with the apparent concern for market equity underpinning the Notice.

These non-reciprocal aspects of the Commission's proposed approach are likely to accentuate foreign governments' perception of the standard as inequitable.

VIII. To the Extent Entry Is Made Contingent on Conditions in the Foreign Carrier's Primary Markets, the Commission Should Consider Overall Opportunities for U.S. Carriers to Compete

In these comments, Teleglobe has discussed in general the drawbacks of a reciprocal market access approach to regulating foreign carrier entry into a market, and in detail the potential negative consequences of the Commission's proposed effective market access test. If, despite these concerns, the Commission decides to implement a reciprocal market access approach, Teleglobe urges the Commission to consider an approach similar to one proposed in a recent draft Congressional bill. The Commission could adopt a "mutually advantageous market opportunities" standard, which would not suggest that a foreign international facilities market must be opened fully to U.S. entry on a near-flash-cut basis as a condition of entry into the U.S. international facilities market. Rather, it would allow entry so long as the markets taken as a whole are sufficiently open to create a climate of mutually advantageous market opportunities for U.S. carriers. A significant existing U.S. presence in the foreign country's telecom markets would be one indicator that such opportunities exist.

A mutually advantageous market opportunities approach would recognize the diversity of paths that various countries are taking toward liberalization of their telecom markets, and would encourage continued progress in these initiatives. Instead of applying the U.S. international facilities-based regulatory template to determine the degree of openness of a foreign market, this approach would hinge on overall market conditions. Consideration of the full range of opportunities for U.S. carriers to participate in a foreign market is a sounder basis for such an evaluation than a test that focuses primarily on a single market segment.

An entry policy based on mutually advantageous market opportunities also would recognize the priority foreign governments place on ensuring the continued existence and viability of their facilities-based international carriers. Given the critical importance of telecommunications infrastructure and services to national economies and national security, this priority is legitimate. Indeed, national security is one of the factors the Commission considers -- and proposes to continue taking into account -- in reviewing foreign carriers' Section 214 applications.

Teleglobe also urges the Commission to reconsider its proposal to adopt an affiliation standard for purposes of applying its market entry test. The Commission proposes to set the affiliation standard at a fixed level of foreign ownership, without regard to the affiliation standards set by the governments in the primary markets of foreign carriers seeking to acquire interests in U.S. international carriers. To the extent the Commission decides in this proceeding to base a foreign carrier's right to enter the U.S. market upon regulatory conditions in its primary markets, the Commission also should adopt the same reciprocal approach with respect to its affiliation standard. That is, to the extent a foreign government permits foreign investment in its carriers up to a specified level without prior review or without altering the carrier's status as a domestic entity, the United States should do likewise.

Finally, regardless of any changes made in this proceeding to the Commission's market entry policies, Teleglobe urges the Commission to publish and abide by a timetable for reaching a final decision on new and pending Section 214 international facilities and services applications. In Teleglobe's opinion, no action could more clearly demonstrate the Commission's commitment to open markets and global competition, and no other step could do more to reduce the regulatory "uncertainty" facing carriers that are considering investing and competing in the U.S. international telecommunications market.

IX. Conclusion

In summary, the Commission's revised international Section 214 public interest test, if adopted, likely would be viewed as an attempt to impose a U.S.-style regulatory paradigm on a flash-cut basis in other countries as a condition for allowing carriers from those countries to participate in the U.S. market. This is inappropriate and could lead to reciprocal tightening of restrictions on market entry, instead of encouraging market openness. Given that there is already a strong global trend in the direction of liberalization and open markets, and that U.S. carriers are benefiting from significant opportunities to enter foreign markets, there is simply no reason for the United States to change its current course. The Commission's laudable goals in this proceeding would actually be harmed, not promoted, by the adoption of the revised public interest standard proposed in the Notice. It is this public interest, and not U.S. carriers' interest, that should be paramount.

Thus, Teleglobe urges the Commission to reaffirm the existing public interest standard, with its appropriate focus on preventing discrimination against unaffiliated U.S. carriers in the foreign entrant's home market. To the extent the Commission does decide to adopt a market entry policy based on reciprocal access principles, Teleglobe urges the Commission to establish a "mutually advantageous market opportunities" standard that focuses on overall conditions in the foreign market. Regardless of any policy changes the Commission may adopt in this proceeding, it should take steps to ensure timely consideration of all international Section 214 applications.

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April 11, 1995

CERTIFICATE OF SERVICE

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